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No. 82-360

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

WILLIAM L. BURTON, et al.,
Appellants,

vs.

WALKER HOBBIE, JR., etc., et al.,
Appellees.

On Appeal from the United States District Court
for the Middle District of Alabama Northern Division
(three-judge panel)

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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TABLE OF CITATIONS

Beer v. United States, 374 F.Supp. 357 (D. D.C. 1974) ____ 4
Berry v. Doles, 438 U.S. 190 (1978) ____ 5
Busbee v. Smith, ___ F.Supp. ___ (D. D.C. May 24, 1982) ____ 4
Canady v. Lumberton City Bd. of Education, 102 S.Ct. 494 (1981) ____ 5
Charlton County Bd. of Education v. United States, 459 F.Supp. 530 (D. D.C. 1978) ____ 4
Coalition to Preserve Houston v. Interim Board of Trustees of the Westheimer Independent School District, 494 F.Supp. 738 (S.D. Tex. 1980) ____ 4
Georgia v. United States, 411 U.S. 526 (1973) ____ 5
Heggins v. City of Dallas, 469 F.Supp. 739 (N.D. Tex. 1979) ____ 3-4, 7
Herron v. Koch, 523 F.Supp. 167 (S.D. N.Y. 1981) ____ 4, 7
Holt v. City of Richmond, 406 U.S. 903 (1972) ____ 5
Horry County v. United States, 449 F.Supp. 990 (D. D.C. 1978) ____ 4-5
Matthews v. LeFlore County Board of Election Comm'rs, 450 F.Supp. 755 (N.D. Miss. 1978) ____ 4
McDaniel v. Sanchez, 452 U.S. 130 (1981) ____ 5-6
Moore v. LeFlore County Bd. of Election Comm'rs, 351 F.Supp. 848 (N.D. Miss. 1971) ____ 4-5
Moore v. Ogilvie, 394 U.S. 814 (1969) ____ 3
Perkins v. Matthews, 400 U.S. 379 (1971) ____ 5
Pitts v. Carter, 380 F.Supp. 4 (N.D. Ga. 1974) ____ 4
Sosna v. Iowa, 419 U.S. 393 (1975) ____ 3
Terrazas v. Clements, 537 F.Supp. 514 (N.D. Tex. 1982) ____ 4-6
United States v. Board of Commissioners of Colleton County, 509 F.Supp. 1329 (D. S.C. 1981) ____ 4
United States v. Board of Supervisors of Warren County, 429 U.S. 652 (1977) ____ 6
United States v. Hale County Commission, 425 F.Supp. 433 (S.D. Ala. 1976), *aff'd*, 430 U.S. 924 (1977) ____ 4
White v. Dougherty County Bd. of Education, 431 F.Supp. 919 (M.D. Ga. 1977), *aff'd*, 439 U.S. 32 (1978) ____ 4-5
Wilson v. North Carolina State Bd. of Elections, 317 F.Supp. 1299 (M.D. N.C. 1970) ____ 5

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Appellants William L. Burton, et al., respectfully pray that this Court will deny the Appellees' motion to dismiss or affirm and that it will note probable jurisdiction in this appeal.

THIS COURT SHOULD NOTE PROBABLE JURISDICTION IN ORDER TO RESOLVE THE CONFLICT BETWEEN THE LOWER COURTS REGARDING THEIR JURISDICTION AND DISCRETION TO AUTHORIZE IMPLEMENTATION OF ELECTION PLANS THAT VIOLATE SECTION 5 OF THE VOTING RIGHTS ACT

Appellees correctly point out that since the drafting and submission of the Jurisdictional Statement, primary elections for the Alabama Legislature have been concluded and the District

Court has indicated its intention to order special legislative elections in the Fall of 1983 under a new reapportionment plan. Motion to Dismiss or Affirm at 8 and n.12. Only 13 of the 35 Democratic Senate nominees face Republican opposition in the November 2, 1982, general election, and only 30 of the 105 Democratic nominees for House Seats have opposition. Three black Senate candidates prevailed in the Democratic primaries, one of whom has Republican opposition in November, and seventeen black candidates for House Seats won in the primaries, only one of whom faces opposition in the general election. If neither of the black candidates is defeated in the general election, under the interim reapportionment plan approved by the District Court blacks will have realized a gain of four seats in the House of Representatives but no gain or loss of seats in the Senate.[1]

Under these circumstances, the posture of this appeal is more in the nature of a challenge to elections already held than it is a petition to enjoin impending elections. This Court's refusal to stay the District Court's interim plan and to postpone the primary elections has substantially changed the equities governing appropriate relief in the event Appellants are successful in this appeal. Appellants still pray that this Court will vacate the District Court's interim plan order and remand the case for the purpose of implementing as soon as practicable a plan which does not adopt parts of the State's plan to which the Attorney General has objected. However, Appellants do not now seek a stay of the November 2, 1982, general election, which at this point is largely a mere formality. Appellants believe that it will be inconsistent with their responsibilities as representatives of the class of black voters in Alabama for them to seek status quo relief from this Court which, at least numerically, reduces the degree of black representation in the House of Representatives.

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[1]House District 90 and Senate District 29, which were the focus of the Attorney General's objection to the reapportionment scheme for the Black Belt, returned their white incumbents in the primaries.

These intervening events and the withdrawal of Appellants' prayer for a stay do not, however, render the issues in this appeal moot. The challenged interim court-ordered reapportionment plan remains in effect, and remedial elections sooner than the unspecified date in the Fall of 1983 may be practicable and warranted.

Even if this Court were to determine that remedial elections ought not be scheduled any sooner than Fall 1983, it should note probable jurisdiction in this appeal on the ground that the issues presented are "capable of repetition yet evading review". *Sosna v. Iowa*, 419 U.S. 393, 399 (1975). In relevant respects, the instant case is indistinguishable from *Moore v. Ogilvie*, 394 U.S. 814 (1969), where the petitioners sought to be certified as candidates in an election that had already been held. *Moore v. Ogilvie* is one of the chief authorities relied on in *Sosna, supra*, 419 U.S. at 399. Whether and under what circumstances a federal district court may authorize state authorities to implement even temporarily voting changes that have not been precleared under Section 5 are questions which have already confronted several courts and are bound to recur with frequency, particularly in reapportionment cases. These are sensitive questions involving both the relationship between the federal judiciary and state and local governments and the propriety of federal court action that frustrates or interferes with statutory voting remedies established by the Congress under the fourteenth and fifteenth amendments. This Court should afford plenary consideration to these issues and resolve what one lower court has called "confusion in the case law about the precise remedy to be accorded to plaintiffs in a case of this nature." *Heggins v. City of Dallas*, 469 F.Supp. 739, 742 (N.D. Tex. 1979).

There is a sharp division among the lower federal courts concerning the extent of their equitable discretion to permit state or local authorities to go forward with unprecleared election schemes on a temporary basis. Under varying circumstances, a number of courts have enjoined the conduct of impending elections where voting changes have been objected to

or otherwise have not been precleared under Section 5. *Busbee v. Smith*, ___ F.Supp. ___ (D. D.C. May 24, 1982) (State of Georgia enjoined from conducting congressional elections under redistricting plan objected to by the Attorney General); *Herron v. Koch*, 523 F.Supp. 167 (S.D. N.Y. 1981) (City of New York enjoined from conducting primary elections where redistricting plan had been submitted to the Attorney General, who had not yet objected); *United States v. Board of Commissioners of Colleton County*, 509 F.Supp. 1329 (D. S.C. 1981) (further elections under unsubmitted at-large election plan for county council enjoined); *Coalition to Preserve Houston v. Interim Board of Trustees of the Westheimer Independent School District*, 494 F.Supp. 738 (S.D. Tex. 1980), *appeal dismissed*, 101 S.Ct. 1335 (1981) (local elections held in defiance of Attorney General's Section 5 objection voided as "legally unenforceable"); *Heggins v. City of Dallas*, 469 F.Supp. 739 (N.D. Tex. 1979) (city elections enjoined where city's declaratory judgment action was still pending in the D. C. district court and the districting plan had not yet been precleared), *citing Matthews v. LeFlore County Board of Election Comm'rs*, 450 F.Supp. 755 (N.D. Miss. 1978); *Horry County v. United States*, 449 F.Supp. 990 (D. D.C. 1978); *White v. Dougherty County Bd. of Education*, 431 F.Supp. 919 (M.D. Ga. 1977), *aff'd*, 439 U.S. 32 (1978); *Pitts v. Carter*, 380 F.Supp. 4 (N.D. Ga. 1974); *Beer v. United States*, 374 F.Supp. 357 (D. D.C. 1974).

Other courts have either failed to enjoin or refused to enjoin elections despite the absence of Section 5 preclearance. *Terrazas v. Clements*, 537 F.Supp. 514 (N.D. Tex. 1982) (some legislative districts objected to by the Attorney General included in temporary court-ordered plan); *Charlton County Bd. of Education v. United States*, 459 F.Supp. 530 (D. D.C. 1978) (primary elections authorized under plan objected to by Attorney General on grounds that district court lacked personal jurisdiction over authorities responsible for elections and that primary elections would not finally determine the candidates elected); *United States v. Hale County Commission*, 425 F.Supp. 433 (S.D. Ala. 1976), *aff'd*, 430 U.S. 924 (1977); *Moore v. LeFlore*

County Bd. of Election Comm'rs, 351 F.Supp. 848 (N.D. Miss. 1971); *Wilson v. North Carolina State Bd. of Elections*, 317 F.Supp. 1299 (M.D. N.C. 1970).

As Appellees point out, Motion to Dismiss or Affirm at 17, there is dictum in one decision of the District Court for the District of Columbia interpreting this Court's decisions in *Georgia v. United States*, 411 U.S. 526, 541 (1973), and *Perkins v. Matthews*, 400 U.S. 379, 389-97 (1971), as recognizing the equitable power of federal district courts to permit enforcement of election law changes *pendente lite* notwithstanding their lack of preclearance under Section 5. *Horry County v. United States, supra*, 449 F.Supp. at 996. In fact, neither of these decisions squarely addresses the proposition cited, and both are readily distinguished by the presence of serious questions about the applicability of Section 5 to the voting changes involved. *See Berry v. Doles*, 438 U.S. 190, 194 (1978) (J. Brennan concurring). Other decisions of this Court imply that, where Section 5 coverage is undisputed, federal courts have "no alternative" but to stay or enjoin impending elections under an unprecleared plan. *Holt v. City of Richmond*, 406 U.S. 903 (1972) (C. J. Burger concurring); *Canady v. Lumberton City Bd. of Education*, 102 S.Ct. 494 (1981) (stay granted to prohibit the implementation of an objected-to annexation); *Dougherty County Bd. of Education v. White, supra* (district court's injunction of an unprecleared voting change affirmed).

The specific exercise of jurisdictional authority and/or discretion at issue in the instant case has never been addressed squarely by this Court.

> No judicial decision addresses the use of a partially unprecleared plan as a temporary, emergency court-ordered plan. The question of the use of unprecleared plans has arisen in the context of whether a legislative plan must initially be submitted for preclearance, e.g., *McDaniel v. Sanchez*, [452 U.S. 130 (1981)]; *Berry v. Doles*, 438 U.S. 190 (1978), not in the context of whether portions of a plan which have been submitted for preclearance and have been objected to can be temporarily utilized upon a dis-

trict court's finding that parts of the objected-to plan are the most equitable under the circumstances.

Terrazas v. Clements, supra, 537 F.Supp. at 539.

This Court should decide whether district courts have the statutory authority *per se* to authorize in any manner the implementation of election changes which have not been precleared either by the Attorney General or by the District Court for the District of Columbia. At the very least, it may be argued that only the District Court for the District of Columbia has the jurisdictional authority to permit temporary implementation of an unprecleared plan *pendente lite. See McDaniel v. Sanchez, supra,* 452 U.S. at 151; *United States v. Board of Supervisors of Warren County,* 429 U.S. 652 (1977). Thus limiting the authority of local district courts would prevent the occurrence of anomalous situations, like the instant one, where state authorities, who otherwise would be forced to file a declaratory judgment action in the District of Columbia prior to implementing an objected-to voting change, may take advantage of a pending private action filed in the local district court to circumvent the explicit enforcement scheme of Section 5.

Even if this Court should conclude that local district courts, as a matter of raw power, may authorize temporarily the enforcement of unprecleared election plans, it should provide clear guidance for the proper exercise of equitable discretion in such cases. The lower court decisions vary substantially with respect to what principles should govern their discretion. For example, the district court in the instant case believed that the objectives of the Voting Rights Act would better be served by allowing impending elections to go forward in spite of the Attorney General's objection, with interim elections to follow a year later. Jurisdictional Statement at A-28-29.[2] The court in

[2]Appellees incorrectly assert that Plaintiffs-Appellants never argued to the District Court that the elections should be postponed if their plans were rejected. Motion to Dismiss or Affirm at 9-10. Plaintiffs' two motions to alter or amend urged postponement of the elections as a last resort. In fact, the District Court's order of June 28, 1982, squarely addressed and rejected this suggestion. Jurisdictional Statement at A-29, para. (5).

Herron v. Koch, 535 F.Supp. at 175, took the opposite position, believing that to allow the city to go forward with planned elections without Section 5 preclearance "would effectively nullify the intended thrust of the section." *Accord, Heggins v. City of Dallas, supra*, 469 F.Supp. at 742 ("it seems to us imminently more equitable to all concerned to delay the election rather than to allow an election in direct contravention of the Voting Rights Act"). The majority in *Heggins v. City of Dallas, supra*, 469 F.Supp. at 742, concluded that the choice of whether or not to enjoin elections under unprecleared plans should be controlled, among competing equitable considerations, by the timing of the plaintiffs' claim. Dissenting, Judge Hill disagreed, urging instead the weighing of factors such as the potential prejudice to the voting rights of racial minorities and the extent to which the State or local government had unduly delayed seeking Section 5 preclearance. *Id.* at 746-47.

Clarification of these issues is badly needed. The confusion of priorities in the provision of judicial relief for Section 5 violations leaves lawmakers, voters and courts alike in a state of uncertainty about the proper course of action to be taken, particularly in the legislative reapportionment process. This defeats the congressional purpose of the Voting Rights Act, which was designed to provide certainty regarding when voting changes may be implemented in covered jurisdictions.

CONCLUSION

For the aforegoing reasons, Plaintiffs-Appellants pray that the Court will note probable jurisdiction in this appeal, and, following plenary review, that it will vacate the interim election order of the District Court and remand the case with instructions that new remedial elections, fully complying with Section 5, be conducted at the earliest practicable opportunity.

Respectfully submitted,

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